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Illinois Commerce Commission  
on its own motion

2003 MAY 12 P 1: 28

Docket No. 01-0705  
CLERK OF COURT'S OFFICE

Northern Illinois Gas Company d/b/a NICOR  
Gas Company

Reconciliation of Revenues collected under  
Gas Adjustment Charges with Actual Costs  
prudently incurred

Illinois Commerce Commission  
on its own motion

Docket No. 02-0067

Northern Illinois Gas Company d/b/a NICOR  
Gas Company

Proceeding to review Rider 4, Gas Cost, pursuant  
to Section 9-244(c) of the Public Utilities Act

Illinois Commerce Commission  
on its own motion

Docket No. 02-0725

Northern Illinois Gas Company d/b/a NICOR  
Gas Company

Reconciliation of Revenues collected under  
Gas Adjustment Charges with Actual Costs  
prudently incurred

**REPLY OF THE COOK COUNTY STATE'S ATTORNEY'S OFFICE AND THE  
CITIZENS UTILITY BOARD TO THE MOTION TO COMPEL DISCOVERY**

Now comes RICHARD A. DEVINE, State's Attorney of Cook County, on behalf of the  
Cook County State's Attorney's Office ("CCSAO") and the Citizens Utility Board by their  
Attorneys ("CUB") in reply to Nicor's Response to the Motion to Compel Discovery states as  
follows:

## **I. Introduction**

Nicor, in its response to the motion to compel of Cook County and CUB, does a masterful, albeit disingenuous, job of obfuscating the issue of its non-compliance with Supreme Court Rules and the ALJs order. There was no ambiguity about the fact that Nicor was to answer fully interrogatories consistent with Supreme Court Rule 213 in regard to its expert witnesses. This was confirmed in a telephone conference with Nicor, that Nicor does not deny, within 1-2 days of the status hearing. The attorneys for the movants even offered to propound the interrogatories in writing. The attorneys for Nicor indicated that that was unnecessary. If there had been any doubt on the part of the movants regarding what was expected or what Nicor agreed to do, written interrogatories would have been filed immediately.

Notwithstanding the foregoing, Nicor filed purported discovery responses that meet neither the letter nor spirit of the ALJs ruling or the Supreme Court Rule. Throughout its response, Nicor indicates that somehow the parties and the ALJs created a hybrid Supreme Court Rule in regard to what its obligations were. Nicor further claims that Supreme Court Rules are not applicable to the ICC, that the ALJs did not intend to apply the Supreme Court Rules, and that its disclosures comport with Rule 213 as applied to this proceeding by the ALJs (Nicor response at pp. 4-5). As will be more fully set forth in this reply, these assertions are without merit and Nicor must be compelled to properly answer written discovery.

## **II. Argument**

### **A. Supreme Court Rule 213 applies to this case.**

A reading of the transcript in its entirety clearly indicates that it was the intent of the ALJs and the movants that Nicor answer Supreme Court Rule 213 interrogatories. It is also clear

that the ALJs did not consider S. Ct. R. 213 atypical for Commission proceedings. Rather, Nicor raised a concern that its testimony may be atypical or “hybrid”<sup>1</sup> in nature. Tr. 109. In order to accommodate such concern, the ALJ requested that if Nicor thought the testimony might be hybrid, then a witness disclosure “in the guise of” the requirements of S. Ct. Rule 213 would be appropriate. *Id.*

Nicor simply did not comply with S.Ct. Rule 213 and admits its noncompliance. (Nicor Response at 3-5.) The ALJs should not allow Nicor to proceed by merely meeting what it claims is the “intent of Rule 213.” (Nicor Response at 5.) The rule is clear on its face and its intent is that there be full and complete disclosure by the parties. Not only did the ALJs require compliance with Rule 213, but also the Commission rules provide for discovery procedures such as Rule 213 interrogatories. 83 Ill.Admn. Code 200.360 (a) and (c) states:

Section 200.360: Depositions and Other Discovery Procedures

- a) The Commission, any Commissioner, the Hearing Examiner or any party may, in any investigation or hearing before the Commission, cause the deposition of witnesses residing within or without Illinois to be taken in the manner prescribed by law for like depositions in civil actions in the courts of Illinois and to that end may compel the attendance of witnesses and the production of papers, books accounts and documents. [220 ILCS 5/10-106] Except under special circumstances and for good cause shown, no deposition may be taken except upon 14 days prior notice to all parties and staff witnesses.

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- c) In addition to depositions, and subject to the provisions of this Part, any party may utilize written interrogatories to other parties, requests for discovery or inspection of documents or property and other discovery tools commonly utilized in civil actions in the Circuit Courts of the State of Illinois in the manner contemplated by the Code of Civil Procedure [735 ILCS 5] and the Rules of the Supreme Court of Illinois [S. Ct. Rules].

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<sup>1</sup> It is important to note that Nicor’s disclosed witnesses are not hybrid and are clearly controlled expert witnesses. S. Ct. Rule 213(f)(3).

Moreover, as noted in the motion, CCSAO/CUB thoroughly discussed with Nicor, both off-the record and during phone conversations that the disclosures would be in conformity with the letter and spirit of S. Ct. Rule 213. (CCSAO/CUB Motion at 4.) Nicor cannot pretend to have been confused or unclear about the requirements of the witness disclosures. Nicor's refusal to comply with S.Ct. Rule 213 is a blatant rejection of the ALJs ruling, the Commission's practice, and its own agreement with CCSAO/CUB.

Full and complete answers to Rule 213 interrogatories form the basis upon which meaningful depositions can be taken. Nicor's failure to properly answer the interrogatories is extremely prejudicial to the movants. The only information provided was the curriculum vitae's of the witnesses and the subject matter of their testimony. There is no indication as to the witnesses' opinions or conclusions or what documents or other material they reviewed in order to reach their conclusions. Nicor also fails to respond to the assertions of CCSAO/CUB that some of its witnesses may not be qualified to render opinions in this docket or that the testimony is cumulative. Perhaps Nicor's reluctance to answer fully and completely discovery authorized by the Illinois Supreme Court, and expressly incorporated into this proceeding by the ICC, is a recognition of these deficiencies. Regardless, the movants urge this tribunal to order Nicor to answer the discovery properly within seven days.

**B. Depositions are an appropriate alternative in this case.**

At a threshold level, Nicor response to CCSAO/CUB's motion regarding depositions raises issues that are troubling to the movants. In it, Nicor intimates that it is only as a result of its acquiescence that depositions will proceed and that its agreement on that issue may be transitory. Nicor states that it questions whether the original rationale for depositions still has merit but that it will honor its original agreement, within reason. (Nicor response at 6). In order

to eliminate any confusion going forward, the movants request that the Commission to order Nicor to answer the discovery properly, to explicitly give the movants the right to take depositions, to order that Nicor produce its employees for depositions, and to authorize the issuance of subpoenas for non-Nicor employees.

It bears repeating that the parties are in contentious litigation regarding the extent to which Nicor has defrauded ratepayers. Nicor has admitted the fraud; the issue is how much is owed ratepayers and the facts behind the action. Nicor complains about the length of time that discovery has taken to date and ignores the fact that it completely controls the flow of information and that motions to compel have been previously filed against it to force discovery compliance. It now files totally incomplete responses to discovery, beyond the time originally ordered, and then has the temerity to insist that the depositions proceed without delay and without answering the discovery. Nicor's position is untenable.

It is clear from Nicor's response that it is now playing "hide the pea." It does not want to answer written discovery and claims, improperly, that the discovery provisions do not apply in this docket. It also does not want to submit its witnesses to a deposition after their testimony is filed but offers no authority for that proposition. When it suits its purposes, it uses rules, real or imagined, as a sword or a shield.

Nicor cannot have it both ways. The movants would urge that the ALJs offer Nicor two choices: answer fully and completely Supreme Court Rule 213 interrogatories or submit its witnesses to a deposition after their testimony is pre-filed. Anything less is extremely prejudicial to the movants ability to ascertain the extent to which Nicor has defrauded ratepayers and misled this Commission in the process.

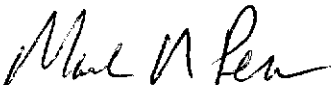
**CONCLUSION**

WHEREFORE, for all the foregoing reasons, CCSAO/CUB respectfully request that this Commission order Nicor to properly answer Supreme Court Rule 213 interrogatories within seven days, or in the alternative, to order Nicor to file its direct testimony within 21 days, with depositions of those witnesses to follow.

Respectfully Submitted,

**RICHARD A. DEVINE**  
State's Attorney of Cook County

Dated: May 9, 2003

By:   
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Assistant State's Attorney

By:   
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Citizen's Utility Board

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**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission	)	
on its own motion	)	
	)	Docket No. 01-0705
Northern Illinois Gas Company d/b/a NICOR	)	
Gas Company	)	
	)	
Reconciliation of Revenues collected under	)	
Gas Adjustment Charges with Actual Costs	)	
prudently incurred	)	
	)	
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	)	
Proceeding to review Rider 4, Gas Cost,	)	
Pursuant to Section 9-244(c) of	)	
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Reconciliation of Revenues collected under	)	
Gas Adjustment Charges with Actual Costs	)	
prudently incurred	)	

**NOTICE OF FILING**

**TO: Attached Service List**

**PLEASE TAKE NOTICE** that on this date, May 9, 2003, we have filed with the Chief Clerk of the Illinois Commerce Commission the enclosed Reply of the Cook County State's Attorney's Office and Citizens Utility Board to the Motion to Compel Discovery in the above-captioned docket.

**CERTIFICATE OF SERVICE**

I, **MARK N. PERA**, hereby certify that a copy of the enclosed Reply of the Cook County State's Attorney's Office and Citizens Utility Board Motion to Compel Discovery was served on all parties on the attached list on the 9<sup>th</sup> day of May 2003, by Fed-Ex, Fax, hand delivery or U. S. first class mail prepaid.

A handwritten signature in dark ink, appearing to read "Mark N. Pera", is written above a horizontal line.

Mark N. Pera  
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